

77/090, 434

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

PHOENIX TRADING, INC., dba
AMERICARE PRODUCTS, INC., a
Washington corporation;

Petitioners,

v.

LOOPS LLC., a Delaware limited liability
corporation,

Respondent,

Cancellation No. 92051757

**MOTION TO REINSTATE AND
PROCEED WITH CANCELLATION
PROCEEDING**

Mark: "Designed for Prison Safety"

Reg. No: 3,424,838

Reg. Date: May 6, 2008

Mark: Trade Dress - Flexbrush Toothbrush

Reg. No: 3,430,304

Reg. Date: May 20, 2008

Mark: Trade Dress - Flexbrush Toothbrush

Reg. No: 3,430,305

Reg. Date: May 20, 2008



02-02-2010

MOTION

U.S. Patent & TMO/TM Mail Rpt D: #0

Pursuant to Trademark Rule §2.127, petitioner hereby moves to reinstate and proceed with this

Cancellation Action.

POINTS AND AUTHORITIES

On January 4, 2010 this proceeding was suspended pending the final outcome of a civil action

Page 1 - MOTION TO REINSTATE AND PROCEED WITH CANCELLATION PROCEEDING

Reg. No: 3,424,838
Reg. No: 3,430,304
Reg. No: 3,430,305

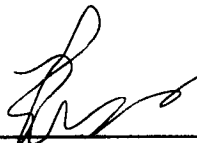
RICK KLINGBEIL, PC
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Suite 950
Portland OR 97204
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1 in the parties. Loops, LLC et al. v. Phoenix Trading, Inc. et al., WDWA case 2:08-cv-01064
2 RSM (Loop case.") The initial claims filed in the Loops case stated claims for trademark
3 infringement. (Klingbeil dec., para. 2, Ex. "2"). The trademark infringement claims have now been
4 dismissed by the Loops plaintiffs. (Klingbeil dec., para. 3, Ex. "1").

5 Trademark Rule §2.117(a) provides for suspension of proceedings whenever the parties to those
6 proceedings are involved in a civil action that may have a bearing on the case. Because the Loops
7 case no longer states claims (or defenses) for trademark infringement, and because the validity of the
8 trademarks are no longer at issue in the Loops case, there exists no potential that the civil action will
9 have any bearing on the subject matter of this Cancellation Action. Accordingly, no basis for
10 suspension exists under Trademark Rule §2.117(a), and this matter should be reinstated.

11 **DATED: January 27, 2010.**

12 **RICK KLINGBEIL, PC**

13 

14 _____
15 Rick Klingbeil, OSB #933326
16 of Attorneys for Petitioner
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CERTIFICATE OF MAILING AND SERVICE

I hereby certify that on January 27, 2010, the foregoing **MOTION TO REINSTATE AND PROCEED WITH CANCELLATION PROCEEDING** was mailed to:

Linda Skoro, Interlocutory Attorney
United States Trademark Trial and Appeal Board
Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451.

I further certify that a true and correct copy of the foregoing **MOTION TO REINSTATE AND PROCEED WITH CANCELLATION PROCEEDING** was served on the following attorneys, known to me to be counsel of record for Loops, Inc., in a sealed envelope, and by email to the email addresses shown below:

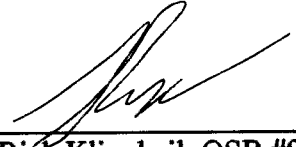
William R Kiendl
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Kari Moyer-Henry
Timothy W. Fitzwilliam
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San Diego, CA 92130
tfitzwilliam@lewiskohn.com
kmoyerhenry@lewiskohn.com

DATED: January 27, 2010.

RICK KLINGBEIL, PC


Rick Klingbeil, OSB #933326
of Attorneys for Petitioner

Page 3 - MOTION TO REINSTATE AND PROCEED WITH CANCELLATION PROCEEDING

Reg. No: 3,424,838
Reg. No: 3,439,304
Reg. No: 3,439,305

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

PHOENIX TRADING, INC., dba
AMERCARE PRODUCTS, INC., a
Washington corporation;

Petitioners,

v.

LOOPS LLC., a Delaware limited liability
corporation,

Respondent,

Cancellation No. 92051757

**DECLARATION OF RICK KLINGBEIL
IN SUPPORT OF MOTION TO
REINSTATE AND PROCEED WITH
CANCELLATION PROCEEDING**

Mark: "Designed for Prison Safety"

Reg. No: 3,424,838

Reg. Date: May 6, 2008

Mark: Trade Dress - Flexbrush Toothbrush

Reg. No: 3,430,304

Reg. Date: May 20, 2008

Mark: Trade Dress - Flexbrush Toothbrush

Reg. No: 3,430,305

Reg. Date: May 20, 2008

DECLARATION

I, Rick Klingbeil, make this declaration in support of Phoenix Trading, Inc.'s *Motion to Reinstate and Proceed with Cancellation Proceeding*.

1. I am a competent adult, one of movant's counsel in this case, and make this declaration

**Page 1 - DECLARATION OF RICK KLINGBEIL IN SUPPORT OF MOTION TO REINSTATE AND
PROCEED WITH CANCELLATION PROCEEDING**

Reg. No: 3,424,838

Reg. No: 3,430,304

Reg. No: 3,430,305

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1 based on facts and circumstances known to me, or, where indicated based on information and belief.

2 2. The initial Complaint filed in the Western District of Washington in the case entitled
3 *Loops, LLC et al. v. Phoenix Trading, Inc. et al.*, Case No. 2:08-cv-1064 RSM ("Loops case")
4 included a "Second Claim for Relief" for Trademark and Trade Dress Infringement. A true and correct
5 copy of the Complaint is attached as Exhibit "2".

6 3. After Amercare filed a Motion for Summary Judgment attacking the viability and
7 enforceability of the Trademark and Trade Dress at issue in this case, the Loops plaintiffs voluntarily
8 dismissed their Second Claim for Relief, removing the viability or enforceability of trademarks / trade
9 dress (now at issue in this Cancellation Proceeding) from any detgermination in the Loops case.

10 4. At the deposition taken of Mr. Steven Kayser, president and owner of the Loops
11 companies, taken on November 5, 2009 counsel for Loops confirmed that the Second Claim for relief
12 had been dismissed from the Loops case. The attached Exhibit "1" is a true and correct copy of
13 relevant pages excerpted from that deposition. The relevant passage has been highlighted. (See,
14 Exhibit "1," page 5 of 8).

15 I declare under penalty of perjury, and pursuant to the provisions of 28 U.S.C. §1746 that the
16 foregoing is true and correct.

17 Executed on: January 27, 2010.

18 
19 Rick Klingbeil

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25 **Page 2 - DECLARATION OF RICK KLINGBEIL IN SUPPORT OF MOTION TO REINSTATE AND
PROCEED WITH CANCELLATION PROCEEDING**

Reg. No. 3,424,838
Reg. No. 3,438,304
Reg. No. 2,438,395

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1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF WASHINGTON
3 AT SEATTLE

4 LOOPS, LLC, a Delaware)
5 limited liability company,)
6 LOOPS FLEXBRUSH, LLC, a)
7 Delaware limited liability)
8 company,) CV08-1064RSM

9 Plaintiff(s),)

10 vs.)

11 PHOENIX TRADING, INC., dba)
12 AMERCARE PRODUCTS, INC., a)
13 Washington corporation; WENDY)
14 HENNING, an individual;)
15 JEFFREY R. HENNING, an)
16 individual; M&L INDUSTRIAL, a)
17 business of unknown)
18 formation; and DOES 1 through)
19 50, inclusive,)

20 Defendant(s).)

21 VIDEOTAPED DEPOSITION UPON ORAL EXAMINATION OF
22 STEVEN KAYSER

23 8:47 A.M.

24 NOVEMBER 5, 2009

25 701 PINE STREET, SUITE 1800

SEATTLE, WASHINGTON

REPORTED BY: MARY L. GREEN, CCR 2981

A P P E A R A N C E S

FOR THE PLAINTIFF(S):

Robert M. Steele
Herron & Steele
350 Tenth Avenue, Suite 880
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(619) 233-4122
Rsteele@herronsteele.com

FOR THE DEFENDANT(S):

Rick Klingbeil
Law Offices of Rick Klingbeil
520 S.W. Sixth Street, Suite 950
Portland, OR 97204
(503) 473-8505
Rick@klingbeil-law.com

ALSO PRESENT: Ed Burke, Videographer
Gloria Kayser

I N D E X

EXAMINATION BY:

PAGE (S)

MR. KLINGBEIL

5

EXHIBITS FOR IDENTIFICATION

PAGE

1 May 5, 2009, letter to Stewart

21

Distribution from Steven L. Kayser;

Reseller License Agreement;

Confidentiality and Nondisclosure

Agreements

1 SEATTLE, WASHINGTON; THURSDAY, NOVEMBER 5, 2009

2 9:00 A.M.

3 --oOo--

4
5 THE VIDEOGRAPHER: Here begins volume 1,
6 videotape number 1 in the deposition of Steven Kayser
7 in the matter of Loops, LLC, et al. Plaintiffs, versus
8 Phoenix Trading, Incorporated, et al., Defendants, in
9 the US District Court, Western District of Washington
10 at Seattle, Case Number CV08-1064RSM.

11 Today's date is November 5, 2009, and the time
12 on the video monitor is 8:47 a.m. The video operator
13 today is Ed Burke contracted by Yamaguchi Obien Mangio
14 of Seattle, Washington. This video deposition is
15 taking place at 701 Pike Street, Suite 1800, Seattle,
16 Washington, and was noticed by the firm Rick Klingbeil,
17 PC, for the defendant, and if counsel could please
18 voice identify yourselves and state whom you represent
19 starting to my right.

20 MR. KLINGBEIL: Rick Klingbeil here for
21 the defendants.

22 MR. STEELE: Bob Steele for plaintiffs.

23 THE VIDEOGRAPHER: And the court
24 reporter today is Mary Green of Yamaguchi Obien Mangio,
25 and please swear in the witness.

STEVEN KAYSER

sworn as a witness by the Notary Public,

testified as follows:

[REDACTED]

EXAMINATION

BY MR. KLINGBEIL:

Q. Mr. Kayser, I'm going to take actually two depositions of you. The first you have been brought forward as the person with the most knowledge at Loops, LLC, and Loops Flexbrush, LLC, on the issuance of licensing of the technology at issue in this lawsuit. The second will be just a general deposition of you as a witness in this case.

So I will begin with the 30(b)(6) person most

1 Q. And just to make sure I'm clear, is it fair to
2 say that the type of licensing -- or type of reseller
3 agreement that we marked as Exhibit 1 is the only type
4 of written agreement to your understanding that you had
5 with any reseller of the Loops Flexbrush?

6 A. Yes.

7 MR. KLINGBEIL: That's all I have for
8 the 30(b)(6). Why don't we take a short break and then
9 we'll get into the main deposition.

10 THE VIDEOGRAPHER: Going off record.

11 The time is 9:34.

12 (Deposition concluded at 9:34 a.m.)

13 (Signature was reserved.)
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I, STEVEN SORISER, have read the within transcript taken November 3, 2009, and the same is true and accurate except for any changes and/or corrections, if any, as follows:

[illegible]

Signed at _____, Washington, on this
date: _____.

STEVEN KATZER

REPORTER'S CERTIFICATE

I, **MARY L. GREEN**, the undersigned Certified Court Reporter and Notary Public, do hereby certify:

That the sworn testimony and/or proceedings, a transcript of which is attached, was given before me at the time and place stated therein; that any and/or all witness(es) were duly sworn to testify to the truth; that the sworn testimony and/or proceedings were by me stenographically recorded and transcribed under my supervision, to the best of my ability; that the foregoing transcript contains a full, true, and accurate record of all the sworn testimony and/or proceedings given and occurring at the time and place stated in the transcript; that I am in no way related to any party to the matter, nor to any counsel, nor do I have any financial interest in the event of the cause.

WITNESS MY HAND, SEAL, AND DIGITAL SIGNATURE this 10th day of November, 2009.

MARY L. GREEN
Certified Court Reporter, #2981
Notary Public in and for the State of Washington,
Residing in Snohomish County. Commission expires 4-4-2013.
mgreen@yemreporting.com

Click Link to Verify Signature:

(<https://digitalid.verisign.com/services/client/index.html>)

Summons Filed Sept 16 1990

JUL 11 2000
U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

00-CV-00000-CMF

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LOOPS LLC, a Delaware limited liability company, LOOPS FLEXIBUSH LLC, a Delaware limited liability company,

Plaintiff,

vs.

PHOENIX TRADING, INC., dba
PHOENIX CARE PRODUCTS, INC., a
Washington corporation; WENDY
PHOENIX, an individual; JEFFREY R.
PHOENIX, an individual; H&L
PHOENIX, a business of unknown
location; and DOES 1 through 20, inclusive,

Defendants.

NO. C 08-1064 Rsm

COMPLAINT FOR PATENT
INFRINGEMENT, TRADEMARK AND
TRADE DRESS INFRINGEMENT;
UNFAIR COMPETITION; FRAUD;
EQUITATIVE RELIEF AND DAMAGES

DEMAND FOR JURY TRIAL

ALLEGATIONS REGARDING PARTIES

1. Plaintiff LOOPS, LLC is a Delaware limited liability company with its principal place of business in Portland, Washington.
2. Plaintiff LOOPS FLEXIBUSH, LLC is a Delaware limited liability company with its principal place of business in Portland, Washington.

COMPLAINT FOR PATENT INFRINGEMENT;
TRADEMARK AND TRADE DRESS
INFRINGEMENT; UNFAIR COMPETITION; FRAUD;
EQUITATIVE RELIEF AND DAMAGES - I

LEE-CHART
P.L.L.C. - Pacific Northwest Law Offices
1000 4th Avenue, Suite 1000 - Seattle, WA 98101-3000
Tel: 206.464.9700 • Fax: 206.464.9700 • E-mail: lee@lee-chart.com

ORIGINAL

1 3. **STEVEN L. KAYSER** is an individual residing in Puyallup, Washington and
2 also is the president, the managing member and majority owner of **LOOPS, LLC** and **LOOPS**
3 **PLEASERUM, LLC**.

4 4. Defendant **PHOENIX TRADING INC. dba AMERCARE PRODUCTS, INC.**,
5 upon information and belief, is a Washington corporation doing business within and with its
6 principal place of business in Seattle, Washington (hereinafter "**AMERCARE**").

7 5. Defendant **WENDY HEMMING**, upon information and belief, is an individual
8 residing in Seattle, Washington and also the president, a shareholder, and the registered agent
9 of Defendant **PHOENIX TRADING INC.**

10 6. Defendant **JEFFREY R. HEMMING**, upon information and belief, is an
11 individual residing in Seattle, Washington and also the vice-president, secretary, a director and
12 shareholder of **PHOENIX TRADING, INC.**

13 7. Defendant **H&L INDUSTRIAL**, upon information and belief, is a business of
14 unknown origin, doing business within and with its principal place of business in Seattle,
15 Washington, owned and operated by Defendant **PHOENIX TRADING INC. dba AMERCARE**
16 **PRODUCTS**. The U.S. agent for **H&L INDUSTRIAL** is Defendant **WENDY HEMMING**.

17 8. The true names, conduct and capacities of the defendants used herein as **DOES 1**
18 through **50** are presently unknown and therefore are used by such fictitious names. Plaintiff
19 will include the **DOE** defendants' true names and capacities when ascertained. On information
20 and belief, each fictitiously named defendant is responsible in some manner, including, inter
21 alia, as partners or affiliated entities, for the conduct alleged herein and for the damages
22 suffered by plaintiff.

23 9. On information and belief and based thereon, at all times mentioned in all the
24 causes of action alleged herein, each and every defendant was the agent, representative,
25 affiliate, controlling party, or employee of each and every other defendant, and in doing the
26 things alleged in the causes of action stated herein, each and every defendant was acting within

**COMPLAINT FOR PATENT INFRINGEMENT;
TRADEMARK AND TRADE DRESS
INFRINGEMENT; UNFAIR COMPETITION; FRAUD;
INJUNCTIVE RELIEF AND DAMAGES - 2**

LEE-CHART

LLC, Inc. - Pacific Northwest Law Offices

**1000 One Commercial Place - 201 One Street - Seattle - WA - 98104-3000
Tel. 206.454.7000 - Toll Free 877.634.7000 - Fax 206.454.5044**

1 the course and scope of such agency, representation, affiliation, control or employment and was
2 acting with the consent, permission, or authorization of the other defendants.

3 JURISDICTION AND VENUE

4 10. This Court has jurisdiction pursuant to both 28 U.S.C. §1330(a) and 28 U.S.C.
5 §1331 because this is an action arising under the patent laws of the United States and under
6 section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), as this is an action for trade dress and
7 trademark infringement. This Court also has jurisdiction of the action under 28 U.S.C. § 1332
8 as there is diversity of citizenship between the parties, and the amount in controversy exceeds
9 the sum of seventy five thousand dollars (\$75,000.00).

10 11. The United States District Court for the Western District of Washington is the
11 appropriate venue for this action in accordance with 28 U.S.C. §1391 and §1400(b), among
12 others, as Defendants are doing business and have committed acts of infringement within the
13 Western District of Washington.

14 COMMON FACTUAL ALLEGATIONS

15 12. Plaintiff LOOPS LLC designs, manufactures, markets and sells a variety of oral
16 hygiene products principally designed for use by prison populations in correctional facilities,
17 including Floor Loops Safety Dental Floss, U.S. Patent No. 6,371,133 B1. Floor Loops are
18 toothable, making the product less dangerous for use by prisoners. The product was designed
19 to prevent prison inmates from harming other inmates and correctional officers. Regular string
20 and nylon dental floss is a major weapon in the hands of prison inmates and is generally banned
21 for inmate usage as inmates can use regular dental floss as a makeshift-type device and to use as
22 type material to escape and also use as a garroting-type device to strangle other inmates and
23 correctional officers.

24 13. Plaintiff LOOPS LLC's Floor Loops Safety Dental Floss was designed to be
25 used for proper oral care by inmates and to eliminate safety concerns for its usage as a tooth
26 cleaning device by inmates. This product is unique and widely used by correctional facilities

**COMPLAINT FOR PATENT INFRINGEMENT;
TRADEMARK AND TRADE DRESS
INFRINGEMENT; UNFAIR COMPETITION; FRAUD;
INJUNCTIVE RELIEF AND DAMAGES - 3**

LESS-SMART

LLC, Inc. - Pacific Northwest Law Offices

**1000 One Commerce Place • 201 5th Street • Seattle • WA • 98101-3000
Tel. 206.454.7700 • Toll Free 877.634.7700 • Fax 206.454.9004**

1 throughout the U.S. and is preferred for inmate use over regular stiling and nylon dental floss of
2 this type sold by AMERCARE.

3 14. Plaintiff LOOPS LLC is the owner and assignee of several patents and
4 trademarks associated with the Floss Loops and Loops Flexbrush and related products.

5 15. Plaintiff LOOPS FLEXBRUSH, LLC also designs, manufactures and sells a
6 variety of oral hygiene products principally designed for use in correctional facilities, including
7 the Loops Flexbrush Safety Toothbrush and other products related to its toothbrush including
8 flexible toothbrush holders. The Loops Flexbrush toothbrush, U.S. Patent No. 7,334,206 B2, is
9 unique in that it was designed with a flexible handle and flexible materials and other features to
10 be used in the prison environment for the safety of prison inmates and correctional officers.
11 The Loops Flexbrush was also designed to enable prison inmates to maintain proper oral health
12 care while incarcerated, without being used as a weapon. Regular toothbrushes in the
13 correctional environment are a major weapon in the hands of prison inmates as they can be
14 sharpened into stabbing and slashing devices. Regular toothbrush holders are likewise weapons
15 for the same reason.

16 16. Plaintiff's Loops Flexbrush and related flexible toothbrush holders eliminate
17 these safety concerns and are used by many U.S. correctional facilities as a substitute for
18 regular toothbrushes and other related products such as those sold by AMERCARE. For
19 example, the New York City Department of Corrections (hereafter "NYC-DOC") purchased
20 the Loops Flexbrush toothbrushes as a substitute and replacement for the regular toothbrushes
21 sold by AMERCARE who previously had a contract with the New York City Department of
22 Citywide Administrative Services (hereafter "NYC-DAS") for the sale of regular
23 toothbrushes.

24 17. STEVEN L. KAYSER ("KAYSER") is the inventor of the Loops Flexbrush as
25 well as other inventions including the flexible toothbrush holder. KAYSER assigned the
ownership of these inventions to LOOPS LLC.

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18. On April 16, 2002, the U.S. Patent & Trademark Office issued Patent No. 6,371,133 B1 to LOOPS LLC titled "VARIABLE GAUGE TOOTH-FLOSSING LOOPS" for the Floss Loops invention.

19. On August 18, 2004, LOOPS LLC submitted an application for a Utility Patent for a flexible handle toothbrush to the U.S. Patent & Trademark Office, Application No. 10/000,332, titled "TOOTHBRUSH AND METHODS OF MAKING AND USING SAME."

20. On August 18, 2004, LOOPS LLC submitted an application for a trademark for the LOOPS FLEXBRUSH to the U.S. Patent & Trademark Office, Application No. 78/007,006.

21. On December 29, 2004, STEVEN L. KAYSER assigned the Patent Application and invention for "TOOTHBRUSH AND METHODS OF MAKING AND USING SAME" to LOOPS LLC.

22. On January 3, 2005, the U.S. Patent & Trademark Office issued a Notice of Publication of Assignment evidencing KAYSER's assignment to LOOPS LLC.

23. On October 4, 2005, the trademark "LOOPS FLEXBRUSH" was first published in the Official Gazette by the U.S. Patent & Trademark Office.

24. On November 23, 2005, LOOPS LLC engaged in the first use in commerce of the trademark "LOOPS FLEXBRUSH" utilizing the trademark on the product, packaging, marketing, correspondence, ordering and sales documents.

25. On November 30, 2005, LOOPS LLC and LOOPS FLEXBRUSH, LLC engaged in the first use in commerce of the trademark "DESIGNED FOR PRISON SAFETY," utilizing the trademark on the packaging, marketing, correspondence, ordering and sales documents for the Floss Loops and Loops Flexbrush products.

26. On January 13, 2006, LOOPS LLC received a call from WENDY HEMMING with PHOENIX TRADING, INC. the AMERSCARE PRODUCTS, INC. HEMMING represented that she owned AMERSCARE PRODUCTS, INC. and provided products to

DISCLAIMER FOR PATENT BURDENMENT;
TRADEMARK AND TRADE DRESS
BURDENMENT; UNFAIR COMPETITION; FRAUD;
INJUNCTIVE RELIEF AND DAMAGES - J
2006/01

LEE CHART
Att. Gen. - Pacific Northwest Law Offices
1000 One Commerce Place - 200 Pine Street - Seattle - WA - 98101-3400
Tel. 206.454.7700 • Toll Free 877.604.7700 • Fax 206.454.5044

1 conventional facilities. HEDBERG requested price quotations for products sold by LOOPS
2 LLC, namely Floss Loops Safety Dental Floss, U.S. Patent No. 6,371,133 B1, which she
3 represented was for one of AMERCARE's customers. HEDBERG also requested samples of
4 all products sold by LOOPS LLC and LOOPS FLEXBRUSH, LLC be sent to her attention at
5 AMERCARE's Woodinville, Washington address, including the Floss Loops Safety Dental
6 Floss and Loops Flexbrush toothbrushes.

7 27. On January 13, 2006, at the request of HEDBERG, KAYSER shipped to
8 HEDBERG samples of all products sold by LOOPS LLC and LOOPS FLEXBRUSH LLC
9 including Floss Loops Safety Dental Floss and Loops Flexbrush Toothbrushes in both 3" and
10 4.25" sizes. The Loops Flexbrush Toothbrushes were shipped in original factory packaging
11 which included "patents pending" and "LOOPS FLEXBRUSH" marks on both the
12 toothbrushes and packaging. The Floss Loops Safety Dental Floss was shipped in original
13 packaging which included thereon the U.S. Patent No. 6,371,133 B1 and the wording "other
14 patents pending."

15 28. On January 24, 2006, HEDBERG contacted LOOPS LLC to order Floss Loops
16 Safety Dental Floss for AMERCARE. From January 24, 2006 through January 23, 2007,
17 HEDBERG ordered on six (6) separate occasions Floss Loops Safety Dental Floss. With each
18 order of Floss Loops product, LOOPS LLC provided factory packaging labeled "U.S. Patent
19 No. 6,371,133 B1, Other Patents Pending." Also, with each order of Floss Loops product
20 shipped to AMERCARE, there were included marketing materials, color photographs and
21 samples of Loops Flexbrush toothbrushes. Further, on December 7, 2006, the Flexible
22 Toothbrush Holder was first used in commerce and AMERCARE was also provided samples,
23 marketing materials and color photographs of the product with their Floss Loops orders.

24 29. On February 23, 2006, the U.S. Patent & Trademark Office first published the
25 Utility Patent application for Flexible handle toothbrush Patent Application No. 10/903,811.

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1 making "TOOTHBRUSH AND METHODS OF MAKING AND USING SAME" in the
2 United States.

3 30. On March 3, 2006, LOOPS FLEXBRUSH, LLC engaged in the first use of the
4 LOOPS MINI-FLEXBRUSH trademark for its 3" size Loops Flexbrush toothbrush.

5 31. On August 9, 2006 LOOPS FLEXBRUSH LLC began doing business with the
6 NYC-DOC. That agency began purchasing Plaintiff's Loops Flexbrush toothbrushes for use by
7 its inmates on an invitation to bid basis and issued orders thereon to Plaintiff approximately
8 every two to three months. On August 9, 2006, the NYC-DOC purchased 94,000 Loops
9 Flexbrush toothbrushes. Between August 9, 2006 and June 6, 2007, the NYC-DOC purchased
10 289,376 Loops Flexbrush toothbrushes.

11 32. On August 15, 2006, LOOPS FLEXBRUSH, LLC engaged in the first use in
12 commerce of the trademark LOOPS MINI-FLEXBRUSH for the 3" size Loops Flexbrush,
13 affixing the trademark on the packaging, marketing, ordering and sales documents.

14 33. On August 22, 2006, LOOPS LLC submitted an application for a trademark for
15 the LOOPS FLEXBRUSH TOOTHBRUSH HOLDER to the U.S. Patent & Trademark Office,
16 Serial No. 78957651.

17 34. On September 19, 2006, the U.S. Patent & Trademark Office issued a Certificate
18 of Registration for the trademark "LOOPS FLEXBRUSH" in the Principal Register,
19 Registration No. 3,146,009.

20 35. On September 26, 2006, LOOPS LLC submitted an application for a trademark
21 for the LOOPS MINI-FLEXBRUSH to the U.S. Patent & Trademark Office, Application No.
22 77-009,857.

23 36. On November 28, 2006, the NYC-DOC issued its second purchase order to
24 LOOPS FLEXBRUSH LLC for 87,264 of the Loops Flexbrush toothbrushes.

25 37. On January 12, 2007, LOOPS LLC submitted an application for a Utility Patent
for a flexible toothbrush holder to the U.S. Patent & Trademark Office, Application No.

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1 CLASS, 13, 44-4 "PACKAGED TOOTHBRUSH AND TOOTHBRUSH CONTAINER AND
2 METHODS OF MAKING SAME."

3 38. On January 23, 2007, HEMMING contacted LOOPS LLC to place what turned
4 out to be AMERCARE's last order for Floss Loops Safety Dental Floss. HEMMING indicated
5 her interest in selling both the Floss Loops Safety Dental Floss and Loops Flexbrush
6 toothbrushes. HEMMING requested that LOOPS LLC and LOOPS FLEXBRUSH, LLC give
7 AMERCARE any and all contracts LOOPS LLC and LOOPS FLEXBRUSH, LLC had for the
8 sale of these products to allow AMERCARE to manage these contracts with LOOPS LLC and
9 LOOPS FLEXBRUSH, LLC supplying the product to AMERCARE. On behalf of LOOPS
10 LLC and LOOPS FLEXBRUSH, LLC, KAYSER refused HEMMING's request.

11 39. On January 24, 2007, LOOPS LLC submitted an application for the trademark
12 "DESIGNED FOR PRISON SAFETY" to the U.S. Patent & Trademark Office, Serial No. 77-
13 699,434.

14 40. On January 24, 2007, LOOPS FLEXBRUSH LLC received a call from Michelle
15 McCoy from the NYC-DCAS requesting the material composition of the flexible handle Loops
16 Flexbrush. LOOPS FLEXBRUSH, LLC provided NYC-DCAS with product specification
17 sheets describing the material composition for the Loops Flexbrush.

18 41. On January 26, 2007, LOOPS LLC personally delivered what turned out to be
19 the last order of Floss Loops Safety Dental Floss to AMERCARE. KAYSER met with
20 HEMMING personally. HEMMING asked for additional samples of Loops Flexbrushes in 3"
21 and 4.25" sizes and Flexible Toothbrush Holders. HEMMING again requested that LOOPS
22 LLC and LOOPS FLEXBRUSH, LLC give AMERCARE any and all contracts LOOPS LLC
23 and LOOPS FLEXBRUSH, LLC had for the sale of these products to allow AMERCARE to
24 manage these contracts with LOOPS LLC and LOOPS FLEXBRUSH, LLC supplying the
25 product to AMERCARE. HEMMING specifically requested that LOOPS FLEXBRUSH, LLC

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1 give AMERCARE the New York City contracts for the sale of the Loops Flexbrushes.
2 RAYNER, on behalf of LOOPS FLEXBRUSH, LLC again refused NEDMANN's request.

3 42. On January 30, 2007, Michelle McCoy of the NYC-DCAS e-mailed a request to
4 LOOPS FLEXBRUSH, LLC for samples of the Loops Flexbrush being purchased at that time
5 by the NYC-DOC. LOOPS FLEXBRUSH, LLC sent ten samples of the 4.25" Loops
6 Flexbrush to NYC-DCAS that same day. The ten samples were shipped in original packaging
7 with the Loops Flexbrush trademark appearing on the back of each toothbrush and on the
8 original packaging along with the wording "patent pending" on each package. The trademark
9 "Designed For Prison Safety" also appeared on each original package.

10 43. On February 7, 2007, LOOPS FLEXBRUSH, LLC sent AMERCARE, at the
11 request of NEDMANN, one case of 48 pieces of Loops Flexbrush samples of both 3" and 4.25"
12 sizes and a partial case of Loops Flexbrush Toothbrush Holders with price quotations. All
13 samples of the Loops Flexbrush toothbrushes were sent in original packaging bearing the
14 Loops Flexbrush trademark, the "Designed For Prison Safety" trademark and other trademarks
15 in addition to "patent pending" on each package. The Loops Flexbrush trademark appeared in
16 raised lettering on the back of each toothbrush. The Loops Flexible Toothbrush Holder
17 packaging had the wording "Patent Pending" and the "Loops Flexible Toothbrush Holder"
18 trademark thereon. The 3" Loops Flexbrush toothbrushes had the "Loops Mini-Flexbrush"
19 trademark on the original packaging and the "Loops Flexbrush" trademark on the back of each
20 toothbrush.

21 44. On March 8, 2007, the NYC-DOC issued its third purchase order to LOOPS
22 FLEXBRUSH, LLC for 24,000 of its Loops Flexbrush toothbrushes.

23 45. On March 21, 2007, the trademark "LOOPS FLEXBRUSH TOOTHBRUSH
24 HOLDER" was first published in the Official Gazette by the U.S. Patent & Trademark Office
25 as Serial No. 78767,831.

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1 46. On March 30, 2007, LOOPS FLEXBRUSH, LLC received a call from the NYC-
2 DCAS requesting additional information regarding the material composition of the Loops
3 Flexbrush. The NYC-DCAS advised LOOPS FLEXBRUSH, LLC they were preparing to put
4 the contract for Loops Flexbrush toothbrush out to bid and they had Loops Flexbrush samples
5 to compare with samples submitted by bidders.

6 47. On April 4, 2007, the NYC-DOC issued its fourth purchase order to LOOPS
7 FLEXBRUSH, LLC for 24,480 of the Loops Flexbrush toothbrushes.

8 48. On April 12, 2007, LOOPS FLEXBRUSH, LLC received an Invitation to Bid
9 from NYC-DCAS. Item 2 of the Invitation to Bid provided the product specifications of the
10 Loops Flexbrush which LOOPS FLEXBRUSH, LLC had previously sent to the NYC-DCAS at
11 the request of the NYC-DCAS. The Invitation to Bid was for a 39 month contract from August
12 28, 2007 through November 29, 2010. The Invitation to Bid referred to the manufacturer as
13 "Loops Flexbrush or Equal" and the brand as "Loops Flexbrush #PB0402 or equal." The
14 Invitation to Bid required a manufacturer's authorization.

15 49. On April 23, 2007, HEMMING contacted LOOPS FLEXBRUSH, LLC.
16 HEMMING represented that NYC-DCAS used AMERCARE for all toothbrush orders in the
17 past until LOOPS FLEXBRUSH, LLC started to supply the Loops Flexbrushes. HEMMING
18 communicated her displeasure with LOOPS FLEXBRUSH, LLC for not giving her the NYC-
19 DCAS contract.

20 50. On information and belief, in the last week of April 2007, AMERCARE
21 submitted four (4) samples of their counterfeit and infringing Loops Flexbrush toothbrush to
22 NYC-DCAS for the Invitation to Bid for the Loops Flexbrush. AMERCARE bid the Loops
23 Flexbrush toothbrush contract at a price of \$7.32 per dozen toothbrushes, which was 42 percent
24 of the price submitted by LOOPS FLEXBRUSH, LLC with its bid. The contract information
25 was withheld from LOOPS FLEXBRUSH, LLC and LOOPS FLEXBRUSH, LLC did not
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1 However this information until July 23, 2007 when the documents were produced to LOOPS
2 FLEXBRUSH, LLC as a result of a FOIL request for public documents.

3 31. On May 17, 2007, NYC-DCAS issued a Notice of Award for Invitation to Bid
4 0000906 to AMERCARE PRODUCTS, INC. for the Loops Flexbrush Toothbrush for the time
5 period of August 30, 2007 through November 29, 2010. This information was withheld from
6 LOOPS FLEXBRUSH, LLC and LOOPS FLEXBRUSH, LLC did not discover this
7 information until July 23, 2007, when the documents were produced to LOOPS FLEXBRUSH,
8 LLC as a result of a FOIL request for public documents. The FOIL document production
9 indicating the award to AMERCARE did not include a manufacturer's authorization from
10 LOOPS FLEXBRUSH, LLC.

11 32. On May 31, 2007, the U.S. Patent & Trademark Office published the LOOPS
12 FLEXIBLE TOOTHBRUSH HOLDER Utility Patent Application No. 11/653,153 in the
13 Official Gazette as Publication No. US 20070119736 A1.

14 33. On June 6, 2007, LOOPS FLEXBRUSH, LLC received its 5th and last order
15 for its Loops Flexbrush toothbrushes from the NYC-DOC for 97,432 toothbrushes. From
16 August 9, 2006 through June 6, 2007, LOOPS FLEXBRUSH, LLC received orders from the
17 NYC-DOC for 329,376 Loops Flexbrush toothbrushes.

18 34. On June 26, 2007, the U.S. Patent & Trademark Office recorded the LOOPS
19 FLEXBRUSH trademark in the Principal Register as Registration No. 3,254,567.

20 35. On July 10, 2007, and unbeknownst to LOOPS FLEXBRUSH, LLC, NYC-
21 DCAS initiated an order with AMERCARE for 191,806 Loops Flexbrush counterfeit and
22 infringing toothbrushes pursuant to the contract awarded to AMERCARE. This information
23 was withheld from LOOPS FLEXBRUSH, LLC and LOOPS FLEXBRUSH, LLC only
24 discovered this information for the first time as a result of a FOIL document request from
25 NYC-DCAS which was produced February 21, 2008. The order by NYC-DCAS was placed
26 well before the contract date of August 30, 2007. AMERCARE shipped 182,304 of its

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1 manufactured and infringing toothbrushes to NYC-DOC on December 12, 2007 and 9,504 of its
2 manufactured and infringing toothbrushes to NYC-DOC on February 5, 2008, pursuant to
3 purchase orders released by NYC-DOC to AMERCARE based on the July 10, 2007 purchase
4 order. The reason for the delay in the NYC-DOC releasing its July 10, 2007 purchase order has
5 been withheld from LOOPS FLEXBRUSH, LLC.

6 56. On July 25, 2007, LOOPS FLEXBRUSH, LLC discovered for the first time that
7 the Invitation to Bid for the Loops Flexbrush was awarded to AMERCARE. LOOPS
8 FLEXBRUSH, LLC learned this information only when documents were produced to LOOPS
9 FLEXBRUSH, LLC as a result of a FOIL request for public documents. The FOIL document
10 production indicating the award to AMERCARE did not include a manufacturer's authorization
11 from LOOPS FLEXBRUSH, LLC.

12 57. On August 13, 2007, KAYSER traveled to New York City on behalf of LOOPS
13 FLEXBRUSH, LLC to meet with representatives of NYC-DCAS and review documents and
14 samples to be produced pursuant to additional FOIL requests for public records by LOOPS
15 FLEXBRUSH, LLC. KAYSER was shown four (4) toothbrush samples submitted by
16 AMERCARE in support of their winning invitation to bid. The four (4) toothbrush samples
17 were identical (which the invitation to bid required) to the Loops Flexbrush toothbrushes.
18 KAYSER informed representatives of NYC-DCAS that LOOPS FLEXBRUSH, LLC was the
19 sole owner of the trademarked and patent pending Loops Flexbrush toothbrushes and that
20 LOOPS FLEXBRUSH, LLC had not authorized anyone to manufacture the products, including
21 but not limited to, AMERCARE.

22 58. On September 4, 2007, LOOPS LLC filed Loops Trade Dress Trademarks with
23 the U.S. Patent & Trademark Office. The marks referred to and identified the nonfunctional
24 total image, design and appearance of the Loops Flexbrush flexible handle toothbrush product
25 as a source identifying role and to prevent consumer confusion of any other product. One
26 application was assigned Serial No. 77271421 for that mark for three symmetrical dot pattern

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1 designs depicted on the toothbrush. The second application was assigned Serial No. 77271405
2 for that mark for the design of the three-dimensional overall appearance of a toothbrush. The
3 two applications for the trade dress trademarks were first published on March 4, 2006, in the
4 Official Gazette of the U.S. Patent & Trademark Office.

5 59. On September 27, 2007, and unbeknownst to LOOPS FLEXBRUSH, LLC,
6 NYC-DCAS placed an additional order with AMERCARE for 34,000 Loops Flexbrush
7 counterfeit and infringing toothbrushes pursuant to the contract awarded to AMERCARE. This
8 information was withheld from LOOPS FLEXBRUSH, LLC and LOOPS FLEXBRUSH, LLC
9 only discovered this information for the first time as a result of a FOIL document request from
10 NYC-DCAS which was produced February 21, 2008.

11 60. On November 17, 2007, LOOPS LLC and LOOPS FLEXBRUSH, LLC
12 jointly served REMANDING with LOOPS LLC's Utility Patent application for a flexible
13 handle toothbrush to the U.S. Patent & Trademark Office, Application No. 10/900,822, titled
14 "TOOTHBRUSH AND METHODS OF MAKING AND USING SAME."

15 61. On December 12, 2007, AMERCARE shipped 182,304 of its counterfeit and
16 infringing toothbrushes to the NYC-DOC pursuant to the July 10, 2007 purchase order. This
17 information was withheld from LOOPS FLEXBRUSH, LLC and LOOPS FLEXBRUSH, LLC
18 only discovered this information for the first time as a result of a FOIL document request from
19 NYC-DOC which were produced June 3, 2008.

20 62. On February 3, 2008, AMERCARE shipped 9,304 of its counterfeit and
21 infringing toothbrushes to the NYC-DOC pursuant to the July 10, 2007 purchase order. This
22 information was withheld from LOOPS FLEXBRUSH, LLC and LOOPS FLEXBRUSH, LLC
23 only discovered this information for the first time as a result of a FOIL document request from
24 NYC-DOC which were produced June 3, 2008.

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63. On February 12, 2008, the U.S. Patent & Trademark Office recorded the **LOOPS FLEXIBLE TOOTHBRUSH HOLDER** trademark in the Principal Register as Registration No. 3,383,396.

64. On February 26, 2008, the U.S. Patent & Trademark Office granted **LOOPS LLC's** Utility Patent application for a flexible handle toothbrush, Application No. 10/930,822, titled **"TOOTHBRUSH AND METHODS OF MAKING AND USING SAME."** The U.S. Patent & Trademark Office issued United States Patent No. 7,334,386 for Toothbrush and Methods of Making and Using Same (hereinafter **"386 Patent"**).

65. On March 4, 2008, the U.S. Patent & Trademark Office published the **DESIGNED FOR PRISON SAFETY** trademark Application Serial No. 77-090,434.

66. On March 4, 2008, the U.S. Patent & Trademark Office published the two **Loops Trade Dress Trademark Applications** for Trademark Serial Nos. 77271,405 and 77271,421 for the marks **"Loops Flexbrush Trade Dress"** and **"Loops Flexbrush Relief Pattern Trade Dress"** respectively in the Official Gazette.

67. On May 6, 2008, the U.S. Patent & Trademark Office recorded the **DESIGNED FOR PRISON SAFETY** trademark in the Supplemental Register as Registration No. 3,424,838.

68. On May 20, 2008, the U.S. Patent & Trademark Office recorded the **LOOPS FLEXBRUSH Trade Dress Trademark** for the three symmetrical dot pattern reliefs depicted on the toothbrush for Serial No. 77271421 in the Principal Register as Registration No. 3,340,301.

69. On May 20, 2008, the U.S. Patent & Trademark Office recorded the **LOOPS FLEXBRUSH Trade Dress Trademark** for the design consisting of a three dimensional overall appearance of a toothbrush for Serial No. 77271405 in the Principal Register as Registration No. 3,340,304.

70. On June 8, 2008, **LOOPS LLC** and **LOOPS FLEXBRUSH, LLC** personally served **JEFFREY R. HERRING** of **AMERICARE** with **LOOPS LLC** Utility Patent No. **US 7,334,386 B2** recorded by the U.S. Patent & Trademark Office on February 26, 2008 for the

**COMPLAINT FOR PATENT INFRINGEMENT;
TRADEMARK AND TRADE DRESS
INFRINGEMENT; UNFAIR COMPETITION; FRAUD;
INJUNCTIVE RELIEF AND DAMAGES - 14**

ASSISTANT

Att. Gen. - Public Marshman Law Offices

**1000 One American Plaza • 200 Pine Street • Suite 400 • Phoenix, AZ 85004-2000
Tel. 602.454.7000 • Toll Free 877.604.7000 • Fax 602.454.7000**

1 Loops Flexbrush "TOOTHBRUSH AND METHODS OF MAKING SAME." JEFFREY R.
2 AMERCARE was also personally served with LOOPS, LLC Trade Dress Trademark, Serial No.
3 77671421 recorded in the Principal Register May 28, 2008, and the LOOPS LLC trademark
4 "LOOPS FLEXBRUSH" registered in the Principal Register on September 19, 2006, and the
5 LOOPS LLC Utility Patent No. US 6,371,133 B1 recorded by the U.S. Patent & Trademark
6 Office on April 16, 2002 for the Floor Loops Dental Floor.

7 FIRST CLAIM FOR RELIEF

8 (Patent Infringement against All Defendants of '206 Patent)

9 71. Plaintiff re-alleges and incorporates the allegations of Paragraphs 1 through 70
10 above as though fully set forth herein.

11 72. On February 26, 2008, United States Patent No. 7,134,206 for TOOTHBRUSH
12 AND METHODS OF MAKING AND USING SAME (hereinafter '206 Patent) was duly and
13 legally issued to Plaintiff.

14 73. Plaintiff is informed and believes and based thereon alleges that since the issue
15 date of the '206 Patent, AMERCARE has infringed and is now infringing Claims 1-32 of the
16 '206 Patent by using, offering for sale and selling the AMERCARE Toothbrush embodying the
17 invention described and claimed in the '206 Patent.

18 74. The infringement was, and continues to be, willful.

19 75. Plaintiff has complied with 35 U.S.C. §287 in providing notice to AMERCARE.

20 76. Plaintiff is entitled to recover damages as provided by 35 U.S.C. §284 and
21 reasonable attorneys' fees as provided by 35 U.S.C. §285.

22 SECOND CLAIM FOR RELIEF

23 (Trademark and Trade Dress Trademark Infringement against All Defendants)

24 77. Plaintiff re-alleges and incorporates the allegations of Paragraphs 1 through 76
25 above as though fully set forth herein.

26
COMPLAINT FOR PATENT ENFORCEMENT;
TRADEMARK AND TRADE DRESS
ENFORCEMENT; UNFAIR COMPETITION; FRAUD;
RESTRUCTIVE RELIEF AND DAMAGES - 15
PAGE 15

ASS-SMART

PL., Inc. - Pacific Northwest Law Offices

1000 One Washington Place - 7th Floor - Seattle - WA 98104-2000
Tel. 206.454.5000 - Toll Free 877.224.5000 - Fax 206.454.5004

1 78. At all material times herein, Plaintiff have been and are engaged in the design,
2 manufacture, marketing and sale of a variety of oral hygiene products designed for use in
3 prisons, including toothbrushes, toothbrush holders, and dental floss under trademark and trade
4 dress trademarks.

5 79. Plaintiff first adopted and used the Loops Flexbrush trademarks and trade dress
6 trademarks in commerce on November 23, 2005.

7 80. Plaintiff submitted its application for trademark registration for "LOOPS
8 FLEXBRUSH" on August 18, 2004, to the U.S. Patent & Trademark Office. The application
9 for the trademark was first published on October 4, 2005, in the Official Gazette of the U.S.
10 Patent & Trademark Office. On September 19, 2006 the U.S. Patent & Trademark Office
11 issued a Certificate of Registration No. 3,144,889 for the trademark LOOPS FLEXBRUSH.
12 Plaintiff owns the registration, which is and continues to be in full force and effect. Plaintiff
13 initially displayed Loops Flexbrush TM and then displayed Loops Flexbrush R with its
14 trademark on its products.

15 81. Plaintiff submitted its two applications for trade dress trademark registration on
16 September 4, 2007 with the U.S. Patent & Trademark Office. The applications for the trade
17 dress trademarks were first published on March 4, 2008, in the Official Gazette of the U.S.
18 Patent & Trademark Office. On May 20, 2008 the U.S. Patent & Trademark Office issued
19 Certificates of Registration Nos. 3,340,304 and 3,340,305 for the two trade dress trademarks.
20 Plaintiff owns the registration, which is and continues to be in full force and effect.

21 82. Plaintiff has used the trademark and trade dress trademarks continuously since
22 November 23, 2005 to identify Plaintiff's toothbrushes. In this connection, Plaintiff uses its
23 trademarks on products and packaging.

24 83. Plaintiff has been engaging in the sale of hygiene products, including but not
25 limited to, toothbrushes, to the prison industry since 1994. Plaintiff has actively and

26
EXHIBIT FOR PATENT INFRINGEMENT;
TRADEMARK AND TRADE DRESS
INFRINGEMENT; UNFAIR COMPETITION; FRAUD;
PREJUDICIAL RELIEF AND DAMAGES - 16
PAGE

LEE-SMART
LLC, Inc. - Seattle Washington Law Offices
1000 One Commercial Drive - 204 One Street - Seattle - WA - 98101-3499
Tel. 206.494.5700 • Fax 206.494.5700 • Cell 206.494.5000

1 continuously promoted the sale of its full line of products, including the toothbrush, to the
2 custom industry bearing its trademarks and trade dress trademarks since November 23, 2005.

3 84. Plaintiff's toothbrushes, have been and continue to be extensively advertised and
4 sold throughout the United States, including the State of Washington, under the trademark
5 **LOOPS FLEXIBLEUM**. By virtue of advertising and sales, together with customer acceptance
6 and recognition, Plaintiff's trademarks and trade dress trademarks identify Plaintiff's
7 toothbrushes only, and distinguish them from toothbrushes manufactured and sold by others.
8 Plaintiff's trademarks and trade dress trademarks have thus become and are valuable assets
9 symbolizing Plaintiff, its quality toothbrushes, and its goodwill.

10 85. Plaintiff is informed and believes, and thereon alleges, that Defendants, with
11 actual knowledge of Plaintiff's ownership of the trademarks and trade dress trademarks, has
12 been and is selling and offering for sale the **LOOPS FLEXIBLEUM** toothbrush to the New York
13 City Department of Corrections and other correctional facilities.

14 86. Plaintiff is informed and believes, and thereon alleges, that Defendants are
15 infringing on Plaintiff's trademarks and trade dress trademarks by selling, and offering for sale
16 to the New York City Department of Corrections and other correctional facilities toothbrushes
17 which are identical to the **LOOPS FLEXIBLEUM** toothbrush which is protected by Plaintiff's
18 trademarks and trade dress trademarks without the permission or authority of Plaintiff and said
19 use by Defendants is likely to cause confusion, to cause mistake and to deceive consumers as to
20 the source, quality, and nature of Defendants' goods.

21 87. Defendants' acts of trademark and trade dress trademark infringement have been
22 committed with the intent to cause confusion, to cause mistake and to deceive consumers as to
23 the source, quality, and nature of Defendants' goods.

24 88. Plaintiff has provided notice to Defendants of their trademarks and trade dress
25 trademarks by supplying Defendants with samples of the products, packaging, marketing and
26 sales documents which are prominently displayed and marked with pending trademarks. In

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1 on June 8, 2006, LOOPS LLC and LOOPS FLEXIBRUSH, LLC personally served
2 JEFFREY R. HERRING of AMERCARE with LOOPS LLC Utility Patent No. US 7,334,206
3 recorded by the U.S. Patent & Trademark Office on February 26, 2006 for the Loops
4 Flexbrush "TOOTHBRUSH AND METHODS OF MAKING SAME." JEFFREY R.
5 HERRING was also personally served with LOOPS, LLC Trade Dress Trademark, Serial No.
6 7571481 recorded in the Principal Register May 20, 2006, and the LOOPS LLC trademark
7 "LOOPS FLEXIBRUSH" registered in the Principal Register on September 19, 2006, and the
8 LOOPS LLC Utility Patent No. US 6,371,133 B1 recorded by the U.S. Patent & Trademark
9 Office on April 14, 2002 for the Flex Loops Dental Floss.

10 89. By reason of Defendants' acts alleged herein, Plaintiff has and will suffer
11 damage to its business, reputation, and goodwill and the loss of sales and profits Plaintiff would
12 have made but for Defendants' acts.

13 90. Defendants continue to do the acts complained of herein, and unless restrained
14 and enjoined, will continue to do so, all to the Plaintiff's irreparable damage. It would be
15 difficult to ascertain the amount of compensation which could afford Plaintiff adequate relief
16 for such continuing acts, and a multiplicity of judicial proceedings would be required.
17 Plaintiff's remedy at law is not adequate to compensate it for injuries threatened.

18 THIRD CLAIM FOR RELIEF

19 (Violation of the Lanham Act against All Defendants)

20 91. Plaintiff re-alleges and incorporates the allegations of Paragraphs 1 through 90
21 above as though fully set forth herein.

22 92. Defendants have caused Loops Flexbrush Toothbrushes to enter into interstate
23 commerce with representations that the products source is AMERCARE. Such designation of
24 origin is false and is likely to cause confusion, to cause mistake and to deceive as to the
25 affiliation, connection or association of defendant with Plaintiff as to the origin, sponsorship, or
26 approval of such Loops Flexbrush Toothbrushes by Plaintiff. These acts are in violation of 15

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1 U.S.C. 1123(a) is that Defendants are passing and/or passing off which is recognized as a false
2 designation of origin under section 43(a) of the Lanham Act.

3 93. Plaintiff has been harmed, among other ways, in that its toothbrushes were
4 harmed in that Defendants' acts have allowed Defendants to unfairly reap the advertising and
5 promotional value that would otherwise go to Plaintiff. By presenting customers with a sample
6 of Plaintiff's product, represented to be Plaintiff's product or equal, and either falsely or
7 implicitly representing that they have the authorization to sell or offer for sale the product,
8 Defendants have misrepresented the origin of Plaintiff's product, as well as the origin of its
9 own product, resulting in harm to Plaintiff.

10 94. Plaintiff has been damaged and will continue to be damaged by diversion of
11 business, injury to its business, reputation and goodwill, reduced association of Plaintiff's
12 trademarks and trade dress trademarks with its toothbrushes, and the false association of
13 Defendants with Plaintiff's goods and business. Plaintiff is entitled to all available relief under
14 15 U.S.C. §1117, including but not limited to, damages, costs, treble damages, interest,
15 compensation for corrective advertising, and an accounting and disgorgement of Defendants'
16 profits, according to proof.

17 95. If not enjoined by the Court, Defendants' acts will continue to mislead
18 customers, and continue to confuse and mislead consumers as to the origin of Plaintiff's
19 toothbrushes and as to the origin and authorization of the toothbrushes actually sold by
20 Defendants.

21 **FOURTH CLAIM FOR RELIEF**

22 **(Unfair Competition under the Washington Consumer Protection Act**
23 **against All Defendants)**

24 96. Plaintiff re-alleges and incorporates the allegations of Paragraphs 1 through 95
25 above as though fully set forth herein.

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1 97. RCW § 19.06.090 provides that unfair methods of competition and unfair or
2 deceptive acts or practices in the conduct of any trade or commerce are declared unlawful.
3 RCW § 19.06.090 makes such violations punishable through a civil action.

4 98. Defendants WENDY HEMMING, JEFFREY R. HEMMING, HAL
5 INDUSTRIAL, and PHOENIX TRADING INC. the AMERICARE PRODUCTS are engaged
6 in trade or commerce in the State of Washington.

7 99. Because of Defendants' actions, more particularly described herein, including
8 but not limited to, passing and/or passing off Plaintiff's goods without authorization and false
9 designation of origin, Plaintiff has been damaged in its business or property in an amount to be
10 proven at trial.

11 100. Defendants' conduct impacts the public interest.

12 101. Plaintiff is entitled to recover costs of suit and reasonable attorney's fees to
13 enjoin Defendants' unlawful conduct.

14 102. Due to the nature of Defendants' actions and the circumstances described herein,
15 Plaintiff is also entitled to treble damages within the limits of RCW § 19.06.090.

16 103. Plaintiff is further entitled to an injunction enjoining Defendants WENDY
17 HEMMING, JEFFREY R. HEMMING, HAL INDUSTRIAL, and PHOENIX TRADING INC.
18 the AMERICARE PRODUCTS from committing such further acts in violation of RCW §
19 19.06.090.

20 FIFTH CLAIM FOR RELIEF

21 (Unfair Competition under Washington Common Law
22 against All Defendants)

23 104. Plaintiff re-alleges and incorporates the allegations of Paragraphs 1 through 103
24 above as though fully set forth herein.

25 105. By committing the above described acts, including but not limited to, passing
26 and/or passing off Plaintiff's goods without authorization and false designation of origin,

27
28 COMPLAINT FOR PATENT INFRINGEMENT;
29 TRADEMARK AND TRADE DRESS
30 INFRINGEMENT; UNFAIR COMPETITION; FRAUD;
31 INJUNCTIVE RELIEF AND DAMAGES - 20
32

LEE SHART

Att. Gen. • Public Defender Law Office

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1 Defendants WENDY HEMMING, JEFFREY R. HEMMING, H&L INDUSTRIAL, and
2 PHOENIX TRADING INC. the AMERCARE PRODUCTS have violated the common law of
3 unfair competition.

4 105. Plaintiff is entitled to all relief available pursuant to each common law,
5 including but not limited to, an injunction restraining Defendants from impliedly or
6 affirmatively representing the nature, quality, and characteristics of its own products or those of
7 Plaintiff, or falsely stating the origin of Plaintiff's products and/or their authorization from
8 Plaintiff concerning the Plaintiff's products.

9 **SIXTH CLAIM FOR RELIEF**

10 (Fraud against Defendants Wendy Hemming and Phoenix Trading Inc.
11 the Amcare Products, Inc.)

12 107. Plaintiff re-illages and incorporates the allegations of Paragraphs 1 through 106
13 above as though fully set forth herein.

14 108. On January 13, 2006, Defendant WENDY HEMMING represented that she
15 owned AMERCARE PRODUCTS, INC. and provided products to correctional facilities.
16 HEMMING requested price quotations for products sold by LOOPS LLC, namely Floss Loops
17 Safety Dental Floss, U.S. Patent No. 6,371,133 B1 which she represented was for one of
18 AMERCARE's customers. HEMMING also requested samples of all products sold by
19 Plaintiff be sent to her attention at AMERCARE's Woodinville, Washington address,
20 including the Floss Loops Safety Dental Floss and Loops Flexbrush toothbrushes. On January
21 13, 2006, at the request of HEMMING, KAYSER shipped samples of all products sold by
22 Plaintiff including Floss Loops Safety Dental Floss and Loops Flexbrush Toothbrushes in both
23 3" and 4.25" sizes.

24 109. On January 26, 2006, HEMMING contacted Plaintiff to order Floss Loops
25 Safety Dental Floss for AMERCARE. From January 26, 2006 through January 23, 2007,
HEMMING ordered on six (6) separate occasions Floss Loops Safety Dental Floss. With each

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1 order of Pile Loops product, Plaintiff provided factory packaging labeled "U.S. Patent No.
2 6,371,133 B1, Other Patents Pending." Also, with each order of Pile Loops product shipped
3 to AMERCARE, there were included marketing materials, color photographs and samples of
4 Loops Flexbrush toothbrushes.

5 110. On January 23, 2007, HEDMENDO contacted Plaintiff to place what turned out
6 to be AMERCARE's last order for Pile Loops Safety Dental Floss. HEDMENDO represented
7 his interest in selling both the Pile Loops Safety Dental Floss and Loops Flexbrush
8 toothbrushes. HEDMENDO requested that Plaintiff give AMERCARE any and all contracts
9 Plaintiff had for the sale of these products to allow AMERCARE to manage these contracts
10 with Plaintiff supplying the product to AMERCARE. On behalf of Plaintiff, KAYSER
11 refused HEDMENDO's request.

12 111. On January 26, 2007, Plaintiff personally delivered what turned out to be the
13 last order of Pile Loops Safety Dental Floss to Amcare. HEDMENDO asked for additional
14 samples of Loops Flexbrushes in 3" and 4.25" sizes and Flexible Toothbrush Holders.
15 HEDMENDO again requested that LOOPS LLC and LOOPS FLEXBRUSH, LLC give
16 AMERCARE any and all contracts LOOPS LLC and LOOPS FLEXBRUSH, LLC had for the
17 sale of these products to allow AMERCARE to manage these contracts with LOOPS LLC and
18 LOOPS FLEXBRUSH, LLC supplying the product to AMERCARE. HEDMENDO specifically
19 requested that LOOPS FLEXBRUSH, LLC give AMERCARE the New York City contracts
20 for the sale of the Loops Flexbrushes. KAYSER, on behalf of LOOPS FLEXBRUSH, LLC
21 again refused HEDMENDO's request.

22 112. HEDMENDO's representations concerning the need for samples of Loops
23 Flexbrush toothbrushes were false, as the true reason for the need for samples of Loops
24 Flexbrush toothbrushes was HEDMENDO's intent to manufacture counterfeit toothbrushes in
25 China to unfairly compete with Plaintiff.

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1 113. Defendants made these representations knowing they were false and with the
2 intent to induce Plaintiff to provide samples of the Loops Flexbrush toothbrush under the
3 false promise that HEMMING intended to order the product for resale to correctional facilities
4 in the same manner as she had ordered the Floss Loops Safety Dental Floss from Plaintiff.

5 114. Plaintiff detrimentally relied on the representations of Defendants by agreeing
6 to supply and then actually supplying Loops Flexbrush toothbrush samples to Defendants on
7 several occasions. Defendants thereafter counterfeited the Loops Flexbrush toothbrush by
8 manufacturing and then importing into the United States from China counterfeit and infringing
9 Loops Flexbrush toothbrushes.

10 115. As a result of Defendants' fraudulent representations, Plaintiff have been
11 damaged in an amount subject to proof.

12 116. The misrepresentations by Defendants were motivated and practiced through
13 fraud, malice and oppression with the intent to harm Plaintiff in their business operations.

14 DEMAND FOR JURY TRIAL

15 117. Plaintiff demand trial by jury on all causes of action.

16 PRAYER FOR RELIEF

17 WHEREFORE, Plaintiff LOOPS LLC and LOOPS FLEXBRUSH, LLC pray for
18 judgment against Defendants WENDY HEMMING, JEFFREY R. HEMMING, H&L
19 INDUSTRIAL, and PHOENIX TRADING INC. aka AMERCARE PRODUCTS as follows:

20 1. That Defendants be required to make an accounting and pay all damages based
21 on Defendants' infringement of Plaintiff's patents;

22 2. For damages pursuant to 35 U.S.C. §284 and reasonable attorney's fees pursuant
23 to 35 U.S.C. §285;

24 3. For compensatory and special damages subject to proof;

25 4. That this Court grant preliminary and permanent injunctions enjoining
26 Defendants WENDY HEMMING, JEFFREY R. HEMMING, H&L INDUSTRIAL, and

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1 PHOENIX TRADING INC. the AMERICARE PRODUCTS, and their agents, servants,
2 employees, and successors, from directly or indirectly importing, manufacturing, contracting
3 out for manufacture, advertising, marketing, using, selling, or offering for sale Loops Fiberglass
4 toothbrushes and/or their equals embodying the '206 patent including, but not limited to, the 3"
5 flexible handle toothbrush and the 4.25" flexible handle toothbrush sold or offered for sale to
6 the New York City Department of Corrections and New York City Department of Citywide
7 Administrative Services pursuant to Notice of Award for Invitation to Bid #700706 and to other
8 correctional facilities and non-correctional consumers;

9 5. That Defendants be ordered to surrender for destruction all products,
10 advertisements, marketing materials, and other materials constituting a false designation of
11 origin of Defendants' toothbrushes;

12 6. That Defendants be ordered to surrender for destruction all products,
13 advertisements, marketing materials, and other materials concerning or related to Loops
14 Fiberglass toothbrushes and/or their equals;

15 7. That Defendants be ordered to pay Plaintiff the Defendants' profits and the
16 actual damages suffered by Plaintiff as a result of Defendants' acts and that, where authorized
17 by law, such damages be trebled because of the willful acts described herein in disregard of
18 Plaintiff's rights;

19 8. That Defendants be compelled to pay Plaintiff's attorneys fees and costs of suit,
20 as allowed by law; and

21 9. For such other relief as the Court deems proper.

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Applications for admission pro hac vice pending

PLAINT FOR PATENT INFRINGEMENT;
TRADEMARK AND TRADE DRESS
INFRINGEMENT; UNLAWFUL COMPETITION; FRAC;
INDUCTIVE RELIEF AND DAMAGES - 25

LEE-204457

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CERTIFICATE OF MAILING AND SERVICE

I hereby certify that on January 27, 2010, the foregoing **DECLARATION OF RICK KLINGBEIL IN SUPPORT OF MOTION TO REINSTATE AND PROCEED WITH CANCELLATION PROCEEDING** and the included **EXHIBITS "1" and "2"** were mailed to:

Linda Skoro, Interlocutory Attorney
United States Trademark Trial and Appeal Board
Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451.

I further certify that a true and correct copy of the foregoing **DECLARATION OF RICK KLINGBEIL IN SUPPORT OF MOTION TO REINSTATE AND PROCEED WITH CANCELLATION PROCEEDING** and the included **EXHIBITS "1" and "2"** were served on the following attorneys, known to me to be counsel of record for Loops, Inc., by first class United States Mail, and by email to addresses shown below:

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Page 3 - DECLARATION OF RICK KLINGBEIL IN SUPPORT OF MOTION TO REINSTATE AND PROCEED WITH CANCELLATION PROCEEDING

Reg. No: 3,424,838
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